

## Faulk, Camilla

---

**From:** Muenster Mark [markmuen@ix.netcom.com]  
**Sent:** Wednesday, December 08, 2010 11:22 AM  
**To:** Faulk, Camilla  
**Subject:** Comment on CrR 4.11

Clerk of the Supreme Court  
Temple of Justice  
PO Box 40929  
Olympia, WA 98504

RE: Proposed rule CrR 4.11

Dear Members of the Court:

I am writing to urge the Court to adopt the new proposed CrR 4.11 which will formally allow the recording of witness interviews in criminal cases by electronic means.

It is fundamental that in order to adequately prepare for trial, a lawyer must interview the potentially adverse witnesses for the other party. Washington decisions recognize that a criminal defense lawyer does not render effective assistance unless such interviews are conducted. See e.g. State v. Visitation 55 Wn. App. 166, 776 P.2d 986 (1989).

To be useful for trial, an accurate record of the interview must be made. While some defendants may be able to afford the additional cost of having a court reporter sit in and transcribe a witness interview, not all accused persons can do so. That is why the rule should explicitly allow recording by electronic means. Recording of the witness interview promotes the goal of obtaining an accurate record, just like having a court reporter record a deposition in civil litigation.

Those who are opposed to the new rule raise several objections, none of which are compelling. The first is that the recording of an interview would violate our Privacy Act, RCW 9.73. Washington decisions regarding this statute have never suggested that recording of a formal witness interview as part of the discovery process of a criminal prosecution would fall under this act. This position was recently reaffirmed by Division II in State v. Mankin.

Secondly, it is suggested by some who are opposed to the rule that counsel's own notes, or those of his investigator, will suffice for trial preparation. Imagine a civil lawyer who attempts to impeach a witness with his own notes. He potentially runs afoul both of the prohibition of being both advocate and witness, and places his own credibility before the jury. The investigator's notes will be subject to attack by the prosecutor regarding their

accuracy and because of the bias of the investigator as an agent of the defense. The focus of the trial then becomes not what the witness said during the interview, but whether the defense investigator's memory or notes of the conversation are accurate. Suffice it to say that neither mechanism is satisfactory for preserving an accurate record of a witness interview and for impeachment at trial.

Third, it is suggested that the witness interview, if taped, will be used to harass the witness or <sup>3</sup>revictimize<sup>2</sup> him or her. While it might be argued that the mere process of being interviewed by defense counsel for trial is stressful for many witnesses, it does not become

inherently more stressful by the presence of a court reporter or a tape recorder. In fact, the making of an accurate record of the interview will tend to protect a witness against harassing conduct by counsel. Moreover, by limiting the need for note taking by counsel, the witness interview can be substantially shortened in time as well.

Finally, it is suggested by opponents of the proposed rule that a recorded interview would be released willy-nilly to the general public or perhaps posted on the internet, to the embarrassment of the witness who might have had to discuss intimate details. The current version of the rule has safeguards to prohibit the dissemination of the interview except as necessary to meet a party's discovery obligations.

The Confrontation Clauses of both the United States and Washington constitutions guarantee the right to confront one's accusers. The proposed rule is an effective mechanism for implementing that right and should be adopted by the Court. Since the stakes in criminal cases are in many ways higher than those of civil litigation, it makes sense to allow the use of recorded interviews for trial just as depositions have been used for years in civil litigation.

Sincerely yours,

Mark W. Muenster  
Attorney at Law  
Past President, WACDL